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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

ROD WALLACE,

Petitioner,

against

JOHN WYNNE HERRON,
JOHN N. GULICK, JR.
LAW OFFICES OF JOHN WYNNE HERRON,
A PROFESSIONAL CORPORATION,
AND DARYL J. MCKINSTRY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT McKINSTRY'S BRIEF IN OPPOSITION

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14 pp

TABLE OF CONTENTS

	Page:
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	9

TABLE OF AUTHORITIES

Page:

UNITED STATES SUPREME COURT DECISIONS

Burger King Corp. v. Rudzewicz, 105 S.Ct. 2174, (1985) 3,7

Calder v. Jones, 104 S.Ct. 1482 (1984) 3,6,7

Fay v. Noia, 372 U.S. 391 (1963) 4

Helicopteros Nacionales de Columbia, S.A. v. Hall, 104 S.Ct. 1868 (1984) 5,7

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 5

Keeton v. Hustler Magazine, Inc., 104 S.Ct. 1473 (1984) 5,6

Kulko v. Superior Court, 436 U.S. 84 (1978) 5

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 4

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 5

UNITED STATES COURT OF APPEALS DECISIONS

Army Times Publishing Co. v. Watts, 730 F.2d 1398 (11th Cir. 1984) 8

Blue Ridge Bank v. Veribanc, Inc., 755 F.2d 371 (4th Cir. 1985) 8

Burt v. Board of Regents of University of Nebraska, 757 F.2d 242 (10th Cir. 1985) 8

Cubbage v. Merchent, 744 F.2d 665 (9th Cir. 1984) .. 8

Donovan v. Grim Hotel Co., 747 F.2d 966 (5th Cir. 1984) 8

Thompson v. Chrysler Motor Corp., 755 F.2d 1162 (5th Cir. 1985) 8

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV 5

STATUTES

Supreme Court Rule 17.1 4,6

OTHER AUTHORITIES

Restatement (Second) of Torts §558(b) (1977) 6

Restatement (Second) of Torts 577A, Comment a (1977) 6

Restatement (Second) of Torts §674 (1977)..... 7

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STATEMENT OF THE CASE

This case was a malicious prosecution action filed by the petitioner, Rod Wallace ("Wallace"), against the respondents, arising from a lawsuit filed by Donna and Willis Seely ("Seelys") against Wallace and several other defendants.

Wallace, an Indiana resident, is an independent contractor for several companies dealing in log-home products. In 1975, the Seelys discussed with Wallace the possibility of obtaining a log home franchise. On April 26, 1975, the Seelys entered into a dealership franchise agreement with Real Log Homes, Inc., giving the Seelys a franchise in northern California. The Seelys moved to California and began working with the Real Log Homes, Inc. franchise.

The Seelys subsequently encountered difficulties in their association with Real Log Homes, Inc., and consulted respondent law offices of John Wynne Herron ("Law Office"). Respondents John Wynne Herron ("Herron") and John N. Gulick, Jr. ("Gulick") filed a lawsuit on behalf of the Seelys in California state court on February 16, 1978 against Real Log Homes, Inc., a Montana corporation, Traditional Living, Inc., a Vermont Corporation, and several individual defendants. The Seelys filed an amended complaint in California on March 1, 1978, adding Wallace as a defendant. Gulick and Herron eventually withdrew from the case and respondent Daryl J. McKinstry entered his appearance in January, 1979. On April 23, 1983, the Seelys dismissed the California suit against Wallace.

The Seelys' suit was filed in a California court involving injuries, damages and causes of actions arising solely in California. Respondent McKinstry has never met Wallace, nor has he ever been in Indiana for the purposes of pursuing a claim against him or for any other reason. Respondents Gulick and Herron are California residents and only Gulick has been in the State of Indiana, coming to Indiana on one occasion for a discovery deposition. The respondents did serve the initial complaint from the California suit on the petitioner at his residence in Indiana; subsequent pleadings were served upon his California counsel.

On March 27, 1984, Wallace brought the present action against the Seelys in the Circuit Court of Brown County, Indiana for malicious prosecution. After the state court

denied the Seelys' motion to dismiss for want of personal jurisdiction, the petitioner added the respondents as defendants and the new defendants removed the case to the United States District Court for the Southern District of Indiana. After the case was removed to federal court, Wallace and the Seelys stipulated to a dismissal of the claim against the Seelys. On January 9, 1985, the Honorable James E. Noland of the United States District Court found that his court lacked personal jurisdiction over the respondents and ordered the complaint dismissed pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. See Appendix pp. A-11 et seq., Petition for Writ of Certiorari. On appeal to the United States Court of Appeals for the Seventh Circuit, the decision of the District Court was affirmed. See Appendix pp. A-1 et seq., Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Due process requires the existence of sufficient minimum contacts among the defendant, the forum and the litigation so that the exercise of personal jurisdiction over the defendant is fair and just. The respondents do not have the requisite minimum contacts with the forum state of Indiana to justify the exercise by Indiana of its personal jurisdiction. The Courts below weighed the facts of the case and correctly determined that sufficient minimum contacts did not exist. A reweighing of the facts does not present a special and important reason for review.

The decision of the Seventh Circuit Court of Appeals is not in conflict with this Court's decisions in *Calder v. Jones*, 104 S.Ct. 1482 (1984) and *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174 (1985). Both cases are factually distinguishable from the present case. *Calder* involved a libel action where the focus of the nonresident defendants' actions was clearly the forum state. The "effects" of their actions on the forum state merely added an additional contact as measured by traditional standards. *Rudzewicz*

involved a contract where the defendant entered into a continuing and extensive relationship with the plaintiff in the forum state. None of these factors exist here. The focus of the respondents' actions was not the forum state, nor did the defendants contract for a continuing and extensive relationship with the petitioner in the forum state.

The present case is also distinguishable from decisions of other Federal Circuit Courts of Appeal which the petitioner contends are in conflict with this decision. Each of those other cases contain facts which evidence strong contacts with the forum state which do not exist here.

For the foregoing reasons, the respondent, Daryl J. McKinstry, submits that there is no special and important reason for the decision of the Seventh Circuit Court of Appeals to be reviewed.

ARGUMENT

A writ of certiorari should be granted only where there are special and important reasons therefor. Supreme Court Rule 17.1; *Fay v. Noia*, 372 U.S. 391, 436 (1963). Special and important reasons do not include issues of merely academic interest or solely in the interest of particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). There are no special or important reasons for granting a writ of certiorari in this case. Therefore, the respondent requests that the writ be denied.

The petitioner is seeking review of a decision by the United States Court of Appeals for the Seventh Circuit which affirmed the dismissal of a suit by the United States District Court for the Southern District of Indiana for lack of personal jurisdiction. However, the courts below were correct in deciding that, under the facts of this case, the defendants did not have sufficient minimum contacts with Indiana to justify the exercise by a court in Indiana of personal jurisdiction over the defendants.

The due process clause of the Fourteenth Amendment limits the power of a state to assert personal jurisdiction over nonresident defendants by requiring that the defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'". *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Where the dispute arises from or is related to the defendants' contacts with the forum, the sufficiency of these contacts must be determined by focusing on "the relationship among the defendant, the forum, and the litigation." *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S.Ct. 1868, 1872 (1984); *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473, 1478 (1984). The defendant's contacts with the forum state must be such that the defendant could reasonably anticipate being haled into court in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The defendants below lacked the necessary minimum contacts with Indiana. The respondents are licensed to practice law in California, not Indiana, and have never been licensed in Indiana. None of the respondents has ever conducted or solicited business within the state of Indiana. Only respondent Gulick had any actual contact with Indiana — one trip to the state to take depositions.

The "minimum contacts" test cannot be applied mechanically; rather, it requires that the facts in each case be weighed to determine whether the necessary minimum contacts exist to justify the exercise of personal jurisdiction. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978). The courts below weighed the facts and correctly concluded that under these facts the due process clause of the Fourteenth Amendment prevented the exercise of personal jurisdiction in Indiana over these California respondents. Inasmuch as the petition requests that the Court reweigh the facts of this case, it raises an issue for

which there are no special or important reasons for review. Supreme Court Rule 17.1.

A. The decision below is not in conflict with applicable decisions of this Court.

The decisions below are not in conflict with the Court's decision in *Calder v. Jones*, 104 S.Ct. 1482 (1984). *Calder v. Jones* is not applicable to the facts of this case. In *Calder*, the defendants' contacts with the forum state were much stronger than in this case. The *Calder* defendants wrote and edited an allegedly libelous newspaper article concerning the California activities of a California resident whose damaged career was centered in California, the forum state. The article was drawn from California sources and was published in a newspaper which had a circulation of over 600,000 copies in California, the state with the highest circulation of that newspaper. Thus the focus of the defendants' actions was clearly the forum state of California. *Calder*, 104 S.Ct. at 1486-87.

Unlike the defendants in *Calder*, the focus here of the respondents' actions was not the forum state of Indiana. The respondents filed and maintained a California lawsuit on behalf of California clients in a California court. Thus, the focus of the respondents' actions was California, not Indiana.

Furthermore, *Calder* involved a libel action. An essential element of a cause of action for libel or defamation is publication to a third party. Restatement (Second) of Torts §558(b) (1977). The importance of this distinction is highlighted by the companion case to *Calder*, *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984): "The tort of libel is generally held to occur wherever the offending material is circulated. Restatement (Second) of Torts §577A, Comment a." *Keeton*, 104 S.Ct. at 1479. In addition, libel harms not only the subject of the libel but also the readers of the libel. *Id.* Therefore, because *Calder* involved a libel action, California had a greater interest in the

litigation than it would have had if it were merely an isolated case of an injury to one of its citizens. Because of the publication in California, the tort occurred in California and California citizens generally were harmed when exposed to the libel.

Malicious prosecution does not have an element analogous to publication. *See* Restatement (Second) of Torts §674 (1977). It cannot be argued that the citizens of Indiana in general were harmed by the alleged malicious prosecution by the defendants. The State of Indiana does not have the same contact with or interest in this litigation as the State of California in *Calder*.

The only similarity between *Calder* and the present case is that in both cases the alleged victim of the defendants' actions was a resident of the forum state. However, this single factor alone is not sufficient to justify the exercise of personal jurisdiction over a nonresident defendant. Nothing in *Calder* removed the requirement that the defendant purposefully establish "minimum contacts" in the forum state. See *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2183 (1985); *Helicopteros Nacionales*, 104 S.Ct. at 1872. Rather, *Calder* merely recognizes that the effect of the defendant's conduct purposefully directed at the forum state may constitute an additional contact. In *Calder*, there were sufficient contacts between the defendants and the forum state such that the focal point of their activity was the forum state. 104 S.Ct. at 1486-87. These contacts do not exist here. The defendants' actions in naming an Indiana resident as one of several foreign defendants in a California suit had no pervasive impact upon other Indiana citizens.

The decisions below also do not conflict with this Court's most recent decision on the matter of personal jurisdiction in *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174 (1985). As in *Calder*, the defendant in *Rudzewicz* had contacts which do not exist under the facts of the case at bar. The dispute in *Rudzewicz* arose out of a written contract which had substantial connections with the forum state. 105 S.Ct.

at 2186. The defendant "entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with" the plaintiff corporation in the forum state. *Id.* Those facts do not exist in the present case. To the extent that *Rudzewicz* reaffirms principles of general applicability, the decision of the Court of Appeals below follows *Rudzewicz*. *See* Appendix, p. A-6, Petition for Writ of Certiorari. The decision below is not in conflict with the Court's decision in *Rudzewicz*.

B. **The decision below is not in conflict with other Federal Courts of Appeals.**

The petitioner cites six cases from other Federal Courts of Appeals to be in conflict with the decision below. However, a reading of those cases reveals that each has facts which support the exercise of personal jurisdiction that this case does not have. *Burt v. Board of Regents of University of Nebraska*, 757 F.2d 242 (10th Cir. 1985), was a defamation case whose nonresident defendants published their libel by sending a letter to a third party resident of the forum state. *Blue Ridge Bank v. Veribanc, Inc.*, 755 F.2d 371 (4th Cir. 1985) was a defamation case where publication occurred in a newspaper of the forum state. *Army Times Publishing Co. v. Watts*, 730 F.2d 1398 (11th Cir. 1984), was another defamation case where the forum state was a "significant market" of the defendant. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985), was a products liability case where allegedly defective replacement parts were shipped into forum state. *Cubbage v. Merchent*, 744 F.2d 665 (9th Cir. 1984) was a medical malpractice case in which defendants engaged in continuous efforts to provide services in the forum state, including arranging for reimbursement from the forum state for services rendered to the forum's residents. *Donovan v. Grim Hotel Co.*, 747 F.2d 966 (5th Cir. 1984), involved personal liability under the Fair Labor Standards Act where a corporate officer defendant ran hotels and

hired managers in the forum state. The respondents here do not have such contacts with the forum state. The decision below is not in conflict with the decisions of other circuits.

CONCLUSION

There are no special or important reasons to grant the writ of certiorari. The case below is not in conflict with any applicable decisions of this Court or of any Federal Court of Appeal. The decisions below were correct. The respondents did not have sufficient minimum contacts to justify the exercise of personal justification over them by the State of Indiana. A further review of the decisions below may only occur by an impermissible reweighing of the facts already considered. The respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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